



# Florida EMPLOYMENT

A monthly newsletter designed exclusively for Florida employers

## Law Letter

G. Thomas Harper, Editor  
Harper Gerlach LLC

Vol. 15, No. 12  
February 2004

### DISABILITY DISCRIMINATION

#### **Do former drug addicts have to be rehired? No final answer yet**

*Even though drug addiction may be a disability for purposes of federal and Florida law, employers don't have to accommodate current drug abuse. An employer may not, however, refuse to consider an applicant because of a history of drug addiction if the applicant isn't currently using drugs. Of course, employers have struggled with the question of whether this applies to the rehire of former employees terminated for misconduct caused by drug addiction.*

*In a recent decision, the U.S. Supreme Court held that a blanket policy of not rehiring employees terminated for misconduct isn't unlawful intentional discrimination. The Court, however, left open the question of whether such a policy might be unlawful nonintentional discrimination.*

#### **Background**

Joel Hernandez worked for Hughes Missile Systems for 25 years. He was terminated in July 1991 after testing positive for cocaine. In company records, the reason for separation was listed as "discharge for personal conduct (quit in lieu of discharge)."

In January 1994, Hernandez applied to be rehired by Hughes. Included with his application were letters confirming that he was no longer abusing drugs. The company rejected his application, however, on the ground that he had been terminated for misconduct.

Hernandez sued Hughes under the Americans with Disabilities Act (ADA) in federal court in California, claiming that he had been unlawfully rejected because of his record of past addiction. The company asked the trial court to dismiss the case on the ground that he had no evidence to support his claim. In response, Hernandez argued

for the first time that if Hughes really did apply a neutral no-rehire policy in his case, it still violated the ADA because such a policy disproportionately disqualified disabled applicants from being hired (adverse impact).

The trial court granted Hughes' request with regard to Hernandez's claim of intentional discrimination. It refused to consider Hernandez's adverse impact claim, however, because he was untimely in raising that theory.

On appeal, the Ninth U.S. Circuit Court of Appeals agreed that Hernandez had failed to timely raise his adverse impact claim. But in analyzing his intentional discrimination claim — that the no-rehire policy was unlawful "as applied to former drug addicts whose only work related offense was testing positive because of their addiction" — the court of appeals concluded that Hughes' application of a neutral no-rehire policy wasn't a legitimate,

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nondiscriminatory reason for rejecting his application. The court of appeals said that Hernandez was entitled to a trial on his claim of intentional discrimination.

Hughes petitioned the Supreme Court to review the court of appeals' decision, and it accepted the case.

### **Supreme Court's decision**

The Supreme Court ruled unanimously (two justices abstained) that the court of appeals didn't apply the correct legal principles and sent the case back to the Ninth Circuit to determine whether there was any evidence to show that the no-rehire policy wasn't the actual reason for the decision.

The court of appeals had mischaracterized Hernandez's workplace misconduct as merely "testing positive because of [his] addiction." The Supreme Court rejected the implication of the court of appeals' decision that when workplace misconduct is related to a disability, refusal to rehire on account of that misconduct must violate the ADA. To the contrary, the Court concluded that a no-rehire policy is a legitimate, nondiscriminatory reason for refusing to rehire an employee who is terminated for violating workplace conduct rules. The Court said that the only remaining question was whether the company's rejection of Hernandez was really based on its consistent application of the policy or whether there was any evidence

that this was used to disguise an illegal reason. *Hernandez v. Hughes*, No. 02-749 (U.S. Supreme Court, December 2, 2003).

### **Comment**

The Supreme Court's decision leaves open the question of whether a neutral no-rehire policy might otherwise be unlawful because it screens out disproportionate numbers of former drug addicts. To defend such a policy, you must be prepared to prove its necessity for the business. The necessity is obvious: It would be much more difficult to enforce your drug and alcohol policy if employees believe they will be entitled to rehire after they "clean up their act." There would be little incentive for employees to stop using drugs until they were caught.

Moreover, finding a no-rehire rule illegal would force an endless cycle of forced rehire decisions. What if the company rehired a former user who tested positive again, was fired again, and then once again applied for work? A rehire rule aimed at two-time losers would have the same, if not more pronounced, "adverse impact" on former addicts. Employers can only hope that when courts face the issue left unanswered in this case, they see the folly of any theory of illegality based on "adverse impact."

*For a copy of this article, please send an e-mail request to Tom Harper at [gth@HarperGerlach.com](mailto:gth@HarperGerlach.com)*

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